EDITOR'S NOTE

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ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-1409

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JANET J. YUCKERT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW Janet J. Yuckert and moves this Court for an Order to permit her to proceed in forma pauperis without payment of fees and costs or security therefore, as provided in 28 U.S.C. §1915, because, as her affidavit indicates, she is unable to pay such costs or give security therefore.

DATED: April 21, 1986.

GIBBS, DOUGLAS, THEILER & DRACHLER

By James A. Douglas
James A. Douglas

25pp

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OTIS R. BOWEN, SECRETARY OF HEALTH
AND HUMAN SERVICES, PETITIONER

v.

JANET J. YUCKERT

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

I, Janet J. Yuckert, being first duly sworn, depose and say that the Secretary of Health and Human Services has petitioned for a writ of certiorari in the above-entitled case; that in support of my motion for leave to proceed in forma pauperis without being required to prepay fees, costs, or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; and that I believe I am entitled to redress.

I further swear that the information set forth below relating to my ability to pay the costs of said proceeding is true.

1. I am presently unable to work because of my disability. I last worked in November, 1979. I am unemployed and my sole source of income is loans from my father and mother. The only cash I have on hand or money in a checking account is from this source.

2. My father keeps very close account of the amounts they lend me. He is retired and on a pension; my mother never worked. They expect me and I have agreed to pay them back for the support they are providing if I ever receiv disability benefits or regain my health.

3. Within the past twelve months I have not received any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source.

4. I do not own any real estate, stocks, bonds, notes, or other valuable property (excluding ordinary household furnishings and clothing). My car is a 1970 Ford Maverick, the value of which is so low it does not even appear in the Blue Book.

5. No one is dependent upon me for support.

6. I was granted leave to proceed in forma pauperis before both the district court and the circuit court of appeals in this action.

I understand that a false statement or answer to any questions in this statement will subject me to penalties for perjury.

Janet J. Yuckert

SUBSCRIBED AND SWORN to before me this 16 day of April, 1986.

Kim Watts
NOTARY PUBLIC in and for the
State of Washington, residing
at Seattle.

KIM WATTS
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES
10-20-88

No. 85 - 1409

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH
AND HUMAN SERVICES, PETITIONER

v.

JANET J. YUCKERT, RESPONDENT

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JAMES A. DOUGLAS, ESQ.
GIBBS, DOUGLAS, THEILER & DRACHLER
1613 Smith Tower
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(206) 623-0900

No. 85 - 1409

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH
AND HUMAN SERVICES, PETITIONER

v.

JANET J. YUCKERT, RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION

QUESTION PRESENTED

Whether the "severity step," either as embodied in the Secretary's regulations, 20 C.F.R. §§404.1520(c) and 416.920(c), or as applied by the Secretary, violates the Social Security Act by allowing the Secretary to make summary denials of disability benefits without considering the effect of a claimant's impairments on the ability to perform past or other work.

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I. STATEMENT OF THE CASE

Respondent Janet J. Yuckert respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision of the Ninth Circuit Court of Appeals in this case. The order and judgment of the district court below and the decision of the Ninth Circuit are found in the Appendix attached to the Petition herein.

Ms. Janet J. Yuckert, Respondent, is a former travel agent whose principal impairment is "bilateral, labyrinthine dysfunction," a condition which makes it difficult to focus her eyes or to stand. Brief of Appellant, Yuckert v. Heckler, 774 F.2d 1365 (9th Cir. 1985), petition for cert. filed No. 85-1409 (Feb. 21, 1986), at 3. "She can just see one word at a time," making the use of her eyes a "tremendous strain." Ibid. She suffers dizziness, and "tends to fall" to her right side. Ibid. "She has learned to compensate by holding onto walls, furniture, counters and by staying within reach of something she can grab." Ibid. She suffers "extremely severe" headaches two or three times per week. Ibid. Previously these headaches occurred "all the time." Ibid. Her condition makes her weak and shaky, and she has problems with stamina. Ibid. She also has problems with her feet which aggravate her difficulty standing. Ibid. The dizziness has affected her mental abilities. Id. at 6. She has been unable to continue many of her former activities, and has great difficulty driving, even on a limited basis. Id. at 5. Unable to do her former work, Janet Yuckert has made an "incredible effort" to learn new skills at a community college. Id. at 8. After a class she needs to sleep for several hours and she is able to study only by alternately working and sleeping in 30 minute stretches. Id. at 4.

Ms. Yuckert applied for Social Security and Supplemental Security Income disability benefits on October 30, 1980.[1] The application was denied as "non-severe." This means the denial was made without regard to the effect of her condition on her ability to do her past or other work. Such denials are commonly referred to as having been made at the "severity step."[2]

After exhausting the available administrative remedies, Ms. Yuckert filed a timely appeal with the United States District Court for the Western District of Washington on August 18, 1982 alleging that the Administrative Law Judge's decision failed to give proper weight to the opinion of the treating physician and was not based on substantial evidence. The district court adopted the Magistrate's recommendation and affirmed the Secretary's findings. Pet. App. 14a and 20a. Ms. Yuckert did not challenge the validity of the "non-severe" regulations in the district court.

Ms. Yuckert appealed to the Ninth Circuit Court of Appeals on December 20, 1984. Shortly thereafter she moved for a remand pursuant to the preliminary injunction issued in a circuit-wide class challenge to the validity of "non-severe" denials, Smith v. Heckler, 595 F. Supp. 1173 (E.D.Cal. 1984), appeal pending, No. 85-2178 (9th Cir., argued Oct. 10, 1985). This motion was denied. Ms. Yuckert then moved to stay proceedings in the court of appeals pending a ruling in one of the other challenges to the "severity step" before the court. The Secretary did not oppose the motion for stay and in fact "suggest[ed] that ... argument in [this] case be stayed" giving as one reason the fact that the Smith injunction had been

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[1] The Social Security Act creates two parallel disability programs. Title II of the Social Security Act provides benefits to disabled workers without regard to financial need. 42 U.S.C. §401 et seq. Title XVI of the Social Security Act creates the Supplemental Security Income program which provides benefits to disabled individuals whose income and resources fall below a specific level. 42 U.S.C. §1381, et seq. The definition of disability, which is the same for both programs, specifically requires that impairments be evaluated in terms of their effect on the claimant's ability to do past or other work. 42 U.S.C. §§423(d)(2)(A) and 1382c(a)(3)(A). (See Heckler v. Campbell, 461 U. S. 458 (1983), for a general description of the Social Security disability program.)

[2] The "severity step" is the second of a series of questions called the "sequential evaluation" used to evaluate disability claims. 20 C.F.R. §§404.1520 and 416.920. As this series of questions is currently structured, no evaluation of the ability to do past or other work is made for claimants whose impairments are found to be "non-severe."

appealed on an expedited basis and was set for oral argument on October 10, 1985. Appellee's Response to Appellant's Motion to Stay Proceedings. The Motion to Stay Proceedings was denied and the court proceeded to consider Ms. Yuckert's appeal. Appellant's brief raised the challenge to the severity regulation for the first time.

The court of appeals reversed and remanded the district court order on October 24, 1985. Yuckert v. Heckler, 774 F.2d 1365 (9th Cir. 1985), petition for cert. filed No. 85-1409 (Feb. 21, 1986). Since there had been no discovery or factual development on the general impact of non-severe denials, the court's analysis was, of necessity, made on solely legal grounds. Specifically, the court found that the severity step "does not permit the individualized assessment of disability required by the [Social Security] Act." Yuckert v. Heckler, 774 F.2d, supra, at 1369. The court relied on Johnson v. Heckler, 769 F.2d 1202, 1210-13 (7th Cir. 1985), reh. den. 776 F.2d 166 (1985) petition for cert. filed No. 85-1442 (Feb. 28, 1986); Baeder v. Heckler, 768 F.2d 547, 531-53 (3d Cir. 1985); Dixon v. Heckler, 589 F.Supp. 1494, 1502-06 (S.D.N.Y. 1984); Delgado v. Heckler, 772 F.2d 570, 574 (9th Cir. 1983); and referred to Heckler v. Campbell, 461 U.S. 458, 467 (1983), for the "statutory scheme for individual determinations." The court rejected the Secretary's argument that the legislative history of the Act endorsed the Secretary's application of the severity regulation. Yuckert v. Heckler, supra, 744 F.2d at 1370.

The court also found that the severity step violated the "long established" precedent of the circuit courts regarding allocation of the burden of proof in disability determinations. Id. at 1370.[3] This allocation requires a claimant to make a prima facie showing of disability by proving an inability to perform past relevant work, after which the burden shifts to the

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[3] The court cites Valencia v. Heckler, 751 F.2d 1082, 1086 (9th Cir. 1985); Francis v. Heckler, 749 F.2d 1562, 1564 (11th Cir. 1985); Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984) (per curiam); Whitney v. Schweiker, 695 F.2d 784, 786 (7th Cir. 1982); Fall v. Secretary of Health, Education & Welfare, 602 F.2d 1372, 1375 (9th Cir. 1979), and referring to Johnson v. Heckler, supra, 769 F.2d, at 1210, and Baeder v. Heckler, supra, 768 F.2d at 553.

Secretary to show that the claimant retains the capacity to perform other work.

Subsequent to oral argument in the court of appeals but prior to issuance of the court's decision, the Secretary submitted a draft of a "Social Security Ruling" purporting to either clarify or alter the "non-severe" step so as not to violate the requirement of the Social Security Act that impairments be evaluated in light of their effect on the ability to engage in substantial gainful activity.[4] The court declined to rule on the validity of this ruling. Id. at 1369 n.6.

The court of appeals remanded Ms. Yuckert's case to the district court "... with instructions that the Secretary reevaluate Yuckert's claim ...." Id. at 1371. However, remand from the district court to the Secretary for further factual development has been deferred at the request of the Secretary pending the present proceedings.

On February 27, 1986, the Secretary filed the pending Petition for Certiorari.

II. ARGUMENT

A. There Is No Circuit Conflict Warranting Resolution By This Court.

The Ninth Circuit in this case joins every circuit which has considered the issue, as well as numerous district courts, in finding that the Secretary's "non-severe" impairment regulations, policies and practices have violated claimants' right to individualized assessments of their disability claims. These cases hold that the purpose of the disability program, as set forth in the Social Security Act, is to assist people whose medical conditions prevent them from working. The Secretary's severity step, which denies or terminates large numbers of people

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[4] This draft was later revised and published as Social Security Ruling (SSR) 85-28.

people without consideration of their actual ability to work, therefore makes no sense.[5]

The Petitioner, while acknowledging that the Ninth Circuit is not alone in invalidating the severity step, asserts that the variations in the reasoning of these decisions warrant Supreme Court review. Yet the only real distinction among the decisions is whether the illegality of the severity step is seen as deriving from an invalid regulation[6] or as being an illegal practice which could be remedied by a stricter reading of the regulation.[7] The only practical effect of this distinction is whether the Secretary can reform the severity step only through a new regulation or whether he can use manuals, rulings and other policy channels.

By focusing on the remedies ordered by the courts rather than the substance of the courts' reasoning, the

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[5] In some years as many as 40% of all disability disallowances were based on the severity step. Baeder v. Heckler, 768 F.2d 547, 552 (3d Cir. 1985); and Dixon v. Heckler, 589 F.Supp. 1494, 1503-1504 (S.D.N.Y. 1984), aff'd __ F.2d __ (2d Cir., Mar. 7, 1986), citing Background Material and Data on Major Programs Within the Jurisdiction of the Committee on Ways and Means, W.M.C.P. 98-2, Committee on Ways & Means, United States House of Representatives, 98th Cong., 1st Sess. at 79 (1983). The percentage of claimants whose claims were originally denied or terminated as "not severe" and who were later found to be in fact disabled by an Administrative Law Judge following court-ordered reevaluation has risen as high as 42% for some months. Memorandum from Maury Ross to Joseph E. Maloney (July 15, 1985), included in "Monthly Report" submitted to the court on August 12, 1985 in Smith v. Heckler, 595 F.Supp. 1173 (E.D.Cal. 1984), appeal pending, No. 85-2178 (9th Cir., argued Oct. 10, 1985).

[6] See, e.g., the present case; Smith v. Heckler, 595 F.Supp. 1173 (E.D.Cal. 1984), appeal pending, No. 85-2178 (9th Cir., argued Oct. 10, 1985) (9th Cir. class); Hansen v. Heckler, 783 F.2d 170 (10th Cir. 1986); Johnson v. Heckler, 769 F.2d 1202 (7th Cir. 1985), reh. den. 776 F.2d 166 (1985) petition for cert. filed No. 85-1442 (Feb. 28, 1986) (Illinois class); Baeder v. Heckler, 768 F.2d 547 (3d Cir. 1985); and Dixon v. Heckler, supra (New York class); McDonald v. Heckler, 624 F.Supp. 375 (D.Mass. 1985) (Massachusetts class).

[7] See, e.g., Stone v. Heckler, 752 F.2d 1099 (5th Cir. 1985); Brady v. Heckler, 724 F.2d 914 (11th Cir. 1984); Evans v. Heckler, 734 F.2d 1012 (4th Cir. 1984); Keith v. Heckler, 732 F.2d 1089 (2d Cir. 1984); Salmi v. Secretary of Health and Human Services, 774 F.2d 685 (6th Cir. 1985). The only Circuit Court of Appeals which has ever even appeared to uphold the severity step is the Sixth. In Gist v. Secretary of Health and Human Services, 736 F.2d 352 (6th Cir. 1984), that court rejected a challenge to the severity step in a one-paragraph statement without the benefit of discovery or in depth analysis. In a more recent opinion, Salmi v. Secretary of Health and Human Services, supra, the Sixth Circuit expanded on Gist to require that the severity regulations be interpreted narrowly, thereby joining the circuits which hold the severity step invalid if not narrowly applied. Salmi, supra, 774 F.2d at 689-692.

Petitioner attempts to establish that circuits which have invalidated only the Secretary's practice, requiring the Secretary to read his regulation more narrowly, are in conflict with those decisions which invalidate the regulation as it is written.[8] Consideration of a few of the cases cited by the Petitioner to support this alleged conflict in fact illustrates the uniformity of the reasoning employed by the courts.

In Baeder, a case which invalidated the regulation, the Third Circuit found that the severity step clearly exceeded a de minimis screening concept and allowed the Secretary virtually unlimited discretion in disability determinations.

> "We believe that section 1520(c) of the regulations does more than allow the Secretary to deny benefits summarily to those applicants with impairments of a minimal nature which could never prevent a person from working. It also allows the Secretary to bypass a full-scale evaluation, which would consider and relate both medical and vocational factors, of an applicant who might actually be entitled to benefits were his age, education and work experience considered."

768 F.2d at 553.

In Stone v. Heckler, 752 F.2d 1099, 1104 (5th Cir. 1985), the Fifth Circuit expressed the same concern regarding discretion used by the Secretary under the aegis of the severity step, but chose to remedy the Secretary's violation of the Act by assuming, on a case-by-case basis, that the Secretary's construction and application of the severity step was invalid.

> "If we read this statute [42 U.S.C. §423(d)(1) and (2)] to authorize the Secretary to deny 'disability' to a claimant suffering a physically or mentally disabling impairment, and for that reason unable to engage in substantial gainful work, whenever the Secretary is not satisfied with the 'severity' of the impairment, we would be holding contrary to the expressed Congressional purpose and rewriting the statute to leave the determination of disability solely to the Secretary's discretion about severe impairments. We can find no justification in the statutory language, nor in the history of this legislation, for the Secretary's position."

The Court added:

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[8] Nearly all of the courts which have considered the validity of the severity step have also held that the severity regulation conflicts with the longstanding rules that a claimant must be afforded the opportunity to establish a prima facie case of disability by showing inability to do past work. See, e.g., the present case; Johnson v. Heckler, supra; Dixon v. Heckler, supra, 589 F.Supp. at 1506. Petitioner does not address this issue.

> "The Secretary does not have the authority to construe the severity regulation so as to deny benefits to individuals who are disabled within the meaning of section 423(d). This circuit in Estran, Davis, and Martin has stated the proper construction of the term 'severe impairment' found in the severity regulation, and the Secretary's construction would render the regulation invalid."

752 F.2d at 1105 (emphasis added).

The Seventh Circuit's statutory analysis in Johnson, supra, 769 F.2d at 1210-11, pinpoints the flaw in the severity step as the Secretary's discretion to preclude claimants from proving their prima facie case.

> "The Act provides that an individual will be found disabled when his 'physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work, but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work...' 42 U.S.C. §§423(d)(2) and 1382c(a)(3)(B) (emphasis added). The Supreme court has recognized that 'disability hearings will be individualized determinations.' Heckler v. Campbell, 461 U.S. 458, 467 (1983). Step two, by contrast, permits the Secretary to label a claimant as not disabled, even though his impairments in fact prevent him from doing his past work...."

(Emphasis in original.)

Finally, Hansen v. Heckler, supra, 783 F.2d at 176, specifically recognized that the issue was one of remedy.

> "We must therefore consider how best to remedy the Secretary's apparent continuing intent to apply the step two severity regulation in a manner that conflicts with the Act and the controlling case law."

Thus the circuits which have invalidated the Secretary's construction and application of the regulation, such as the Stone Court, have used the same analysis as that used by courts which have invalidated the regulation per se. Each court has found that the regulation has been used in a manner which violates claimants' rights. Whether the needed reform must be published as a regulation or can be implemented through rulings and manual changes simply does not warrant review by this Court.

Petitioner has also undertaken to discover a split between the Yuckert decision and Johnson v. Heckler, supra, by portraying the present case as precluding the possibility of a de minimis screening standard. Petitioner states:

> "[T]he [Yuckert] court held that the severity regulation is inconsistent with 42 U.S.C. §423(d)(2)(A), which provides that a claimant may be found to be disabled only if his impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy. The court interpreted this provision to require the Secretary 'to consider factors such as [the claimant's] age, education, work experience, and ability to do past work' in every individual disability determination, irrespective of whether the claimant has demonstrated that his impairment satisfies a threshold level of severity. App., infra, 5a, 9a."

Pet. at 8 (emphasis added).

This characterization is pure fabrication. The underlined phrase does not appear anywhere in the Yuckert decision.[9] In fact, there has as of yet been no discussion in the present case, either at the district court level or in the Ninth Circuit, of what sort of de minimis screening standard might comply with the Social Security Act.

Finally, in an attempt to reinforce his argument that there is a significant split in the circuits, the Petitioner argues that the Secretary and the state agencies must know whether they may apply the severity regulation to the "scores of thousands of disability claims filed." Pet. at 11. The more relevant question would be whether the "severity step" as it has been applied is valid. Petitioner does know the answer to this question, having been told very clearly by every circuit which has considered the issue that the Secretary may not use the

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[9] Petitioner has similarly mischaracterized the Yuckert holding in his petition for certiorari in Johnson. That petition states:

> "[T]he Ninth Circuit held that the severity regulations are invalid because ... (ii) they do not provide for a specific consideration of the claimant's age, education, and work experience in every case." Petition for a writ of certiorari, Johnson v. Heckler, 769 F.2d 1202 (7th Cir. 1985), reh. den. 776 F.2d 166 (1985) petition for cert. filed No. 85-1442 (Feb. 28, 1986), p. 13.

Petitioner then proceeds in the Johnson petition to urge this Court to accept Yuckert as a "more appropriate vehicle" for certiorari, reasoning that this (incorrect) characterization of Yuckert conflicts with Johnson.

"severity step" to deny benefits to claimants who might otherwise be able to prove their eligibility for benefits.[10]

Not every difference in the holdings of different Circuits warrants resolution by the Supreme Court. As Justice Harlan wrote, nearly 30 years ago:

> "... [A] conflict of decisions may safely be relied on as a ground for certiorari in instances where it is clear that the conflict is one that can be effectively resolved only by prompt action of the Supreme Court alone." [11]

Certainly this is a case where Supreme Court intervention is not warranted.

B. Even If The Distinction Between The Rulings of the Circuits Were Significant, They Cannot Be Adequately Resolved In This Case At This Time.

There is no basis for the Secretary's designation of this individual case as an "appropriate vehicle" for review of the "severity step." Petition for cert. Johnson v. Heckler, supra, p. 13. Even if the differences in reasoning of the circuit courts were significant, resolution of those differences by the Supreme Court at this time and in the present case is inappropriate for three reasons. Firstly, Ms. Yuckert's disability claim may well be resolved by the remand proceedings below. Secondly, the absence in this case of any discovery or factual development regarding the history, the functioning, and broad impact of the "severity step" makes review of this case by this Court inappropriate. Finally, where the Secretary has so recently attempted to enunciate a standard to comply with the de minimis screening principles articulated by the circuit courts of

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[10] The Petitioner's allegation that orders enjoining the severity step have produced "substantial disruption in the administration of the Social Security disability program" (Pet. at 22-23) contradicts his own findings in previous statements. See Letter from Associate Commissioner of Disability, Patricia Owens, to all Disability Determination Services Administrators (Dec. 16, 1985) regarding implementation of the not severe impairment policy clarification. Using the present case as an illustration, there is every reason to think that Janet Yuckert's capacity to return to her past work could have been considered with minimal expense and effort.

[11] Mr. Justice Harlan, "Some Aspects of the Judicial Process in the Supreme Court of the United States," 33 Australian L.J. (1959), quoted in Stern and Gressman, Supreme Court Practice, 5th ed. 1978.

appeals, and the trial courts have not been given the opportunity to consider the factual contexts in which the new ruling will be utilized, this Court has neither the obligation nor the resources to consider whether SSR 85-28 articulates such a de minimis standard.

The Ninth Circuit ordered that Janet Yuckert's claim be reevaluated by the Secretary "without reference to the severity regulation." Yuckert v. Heckler, 774 P.2d, at 1371. Whether the Secretary finds that Janet Yuckert is disabled or not, the result of this reevaluation will be to make the present proceedings moot. Were the present proceedings in the nature of an appeal from a district court to a circuit court of appeals, it is probable that, in light of the pending remand, there could be no "final decision" and appeal would be improper. As stated by Mr. Justice Blackmun (then Circuit Judge), "[u]ntil the Secretary acts on the remand we have no insight as to what his eventual decision will be." Bohms v. Gardner, 381 F.2d 283, 285 (8th Cir. 1967), cited in Dalton v. Richardson, 434 F.2d 1018 (2d Cir., 1970), cert. den. 401 U.S. 979 (1970).[12]

Ms. Yuckert is an individual claimant who did not challenge the validity of the severity regulations in the district court. Accordingly the present case presents no analysis or discovery regarding either the impact of the severity step on impairments other than Ms. Yuckert's or what mechanism, if any, might properly replace the "severity step."[13] The district court opinion is an unpublished one-page order adopting the short recommendation of the Magistrate, which turned on the question of substantial evidence. The Ninth Circuit analysis is based on solely legal grounds. An analysis which must focus on

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[12] See also Gilchrist v. Schweiker, 645 F.2d 818 (9th Cir. 1981); Mayersky v. Celebrezze, 353 F.2d 89 (3d Cir. 1965); Whitehead v. Califano, 596 F.2d 1315 (6th Cir. 1979). But see Cohen v. Perales, 412 F.2d 44 (5th Cir. 1969), rev'd on other grounds sub nom. Richardson v. Perales, 402 U.S. 389 (1971).

[13] This Court has previously dismissed writs of certiorari as improvidently granted where the record was insufficient for an adequate consideration of the questions raised by the court. See Massachusetts v. Painten, 389 U.S. 560 (1968); Johnson v. Massachusetts, 390 U.S. 511 (1968); Wainwright v. New Orleans, 392 U.S. 598 (1967); Smith v. Mississippi, 373 U.S. 238 (1963).

the facts of a single case with a necessarily sparse record would limit and improperly affect this Court's review. This Court needs a factual analysis of the impact of the "severity step" presented by the complex and varied factual records in class actions.

The volumes of discovery documents produced pursuant to class action challenges have illuminated internal controversies and criticisms of the severity step. Although Petitioner has alleged that the severity regulation invalidated in Yuckert facilitates the "fair, efficient, and uniform adjudication" of disability claims, Pet. at 10, his own actions indicate a recognition of the need for broader factual development on this issue. The Secretary supported Respondent's motion to stay proceedings in the Ninth Circuit in the present case pending resolution of the legality of the severity step in a class action. See Statement of the Case, supra, pp. 2-3. In addition the Secretary recently ordered a broad-based study of the severity step.[14] The results of the study reveal a lack of uniform application of the severity step in approximately 40% of a test sample of 800 cases. In 309 cases, the Office of Disability physicians assessed the severity level of the impairment(s) differently than did the State physicians, or questioned the documentation used to assess severity. The study concluded that "misunderstanding regarding the threshold level of not severe cases (the level at which an impairment is considered severe rather than not severe) was clearly exhibited." (Report, p. 6.) Nor is this the first study undertaken by the Secretary to come to this conclusion.[15]

It was at least partly in recognition of widespread "misunderstanding and misapplication of the not severe threshold"

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[14] Smith v. Heckler, Civ. No. F83-1609 EJG, Supplemental Response to Plaintiffs' Second Request for Production of Documents. "Report on the Not Severe Case Study -- information," dated March 14, 1986, Associate Commissioner of Disability to Regional Commissioners.

[15] See "Final Report and Recommendations" contained in Memorandum to Acting Deputy to the Deputy Commissioner for Programs and Policy of the Department of Health and Human Services from Leader, "Not Severe Impairment Workgroup," (Aug 23, 1983) (obtained in discovery in Dixon v. Heckler, supra, and Smith v. Heckler, supra.

that the Secretary issued Social Security Ruling 85-28, "to resolve the inconsistent application of the not severe policy." Report, p. 7. The cautious language of SSR 85-28, the attempt to articulate a de minimis standard that appears on the final pages of the Secretary's petition in this case (Pet. at 23-24), the recent study and the existence of at least one previous study, all suggest that the Secretary is well aware of the need for a remedy that will respect the statutory mandate of individualized assessments in disability determinations.

These developments may well play a significant role in future severity step litigation. As the Petitioner admits, the Yuckert Court "expressed no view on the validity of the new ruling," Pet. at 10, nor has any other circuit court opinion (whether finding the current regulations invalid or the Secretary's policies and practices invalid) foreclosed the possibility of the Secretary promulgating and implementing a valid de minimis screening standard. Whether or not a standard can be devised that can operate as a de minimis screening device is largely a factual question which must be answered in the context of its actual application, and which should be addressed initially in the trial courts.[16]

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[16] In declining to rule on the validity of SSR 85-28, the Ninth Circuit relied in part on the fact that the "ruling" submitted by government counsel had not yet been published. Indeed, the published version of SSR 85-28, which was issued a month after the Ninth Circuit's decision, contained a number of significant modifications. The Secretary removed language requiring that basic work activities be "prevented"; revised the ruling's footnote regarding older individuals to relax eligibility requirements; and revised the ruling's language to make clear that the ruling contemplated not severe findings in some cases of individuals who could not, in fact, return to their prior work. Thus, even if the Ninth Circuit had decided the validity of the version of the proposed ruling submitted by government counsel, it could not have adjudicated the abstract validity of a final ruling that was not yet published.

In any event, Ms. Yuckert's individual case is not a proper context for considering the validity of the Secretary's new ruling. The ruling was not applied in her case. To the extent that injunctions in other cases may restrict the Secretary's ability to employ his new ruling, the proper course for the Secretary is to seek relief, if appropriate, from the courts that issued those injunctions.

C. Petitioner's Argument That the Legislative History Validates the Severity Step Is Inappropriate At This Time And In Any Event Has Been Universally Rejected.

The Secretary devotes fully ten pages to restating the universally rejected position that the severity step has been validated by the legislative history of the various amendments of the Social Security Act.[17] The purpose of rearguing one aspect of the Secretary's position in a petition for writ of certioari is not apparent, especially since the Secretary does not even allege that the circuits are divided on this question. However, since the Secretary has devoted so much attention to this argument, some response is required.

The definition of disability has remained basically unchanged since it was introduced into the Social Security Act in 1954:

> "... inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a period of not less than 12 months."

42 U.S.C. §423(d)(1)(A), and 1382c(a)(3)(A). (Emphasis added.)

This definition attaches no conditions to the nature of the impairment, so long as it is medically determinable, of sufficient duration, and results in the inability to do any substantial gainful work.

In 1967, Congress elaborated on the basic definition in what is now 42 U.S.C. §423(d)(2)(A) and (3) (P.L. 90-248). The Congressional reports accompanying the 1967 amendments indicate the motivation for this elaboration was concern that certain courts had found claimants disabled not because they were unable to engage in any substantial gainful activity, but rather because the work they were able to do was unavailable in their geographic area or because they would be unlikely to be hired for jobs that they could do. S.Rep.No. 744, 90th Cong., 1st Sess. (1967),

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17 See, e.g., Johnson v. Heckler, supra, 769 F.2d at 1212 ("The legislative history of the 1984 amendment cuts against, rather than supports, the Secretary's arguments in this case."); and Baeder v. Heckler, supra, 768 F.2d at 551 ("Both the statute and the legislative history speak in terms of medical and vocational factors and emphasize the importance of the relation between the two.")

reprinted in [1967] U.S. Code Cong. & Admin. News 2880-2881; H.Rep.No. 544, 90th Cong., 1st Sess. (1967), 28-31. These provisions make it clear that disability claims must be based on "anatomical, psychological abnormalities," but that the measure of disability remains the ability to work. Specifically:

> "An individual (except a widow, surviving divorced wife, widower or surviving divorced husband for purposes of section 402(e) or (f) of this title) shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy...."

42 U.S.C. §423(d)(A). (Emphasis added.)

The 1967 amendments also demonstrate the vocational measure of disability by contrasting the deliberately "more restrictive" definition of disability applicable to widows and widowers. Disability for surviving spouses is defined "... solely on the level of severity of the impairment ..." and "...without regard to nonmedical factors such as age, education and work experience, which are considered in disabled worker cases." S.Rep.No. 744, supra, at 2882; see also H.Conf.Rep.No. 1030, 90th Cong., 1st Sess. (1967), reprinted in [1967] U. S. Code Cong. & Admin. News 3197-3198.

Finally, in 1984 Congress passed section 4(a)(1) of the Reform Act (Pub.L. 98-460, signed Oct. 9, 1984) which mandated the consideration of the combined effect of impairments. Petitioner has attempted to make much of this amendment. However, as observed recently in McDonald v. Heckler, 624 F.Supp. 375, 379 (D.Mass. 1985), there is no reason to think this language was intended to do anything "more than require the Secretary to discontinue h[is] policy of refusing to consider the combined effect of non-severe impairments." See also Johnson v. Heckler, supra, 769 F.2d at 1214.

Since Congress is constantly in the process of refining the Social Security Act, the volume of legislative history which has accumulated since the disability program was instituted is extensive. The Secretary's argument that the legislative history supports his position consists of an attempt to comb through this

history for phrases which arguably support his position. In spite of the vastness of the legislative history available to the Secretary, he has produced nothing which would alter the plain language of the statute.

IV. CONCLUSION

For all the foregoing reasons, the Secretary's petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER, v. JANET J. YUCKERT	No. 85-1409

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the following by air mail on April 21, 1986 addressed to Edwin S. Kneedler, Assistant to the Solicitor General, Department of Justice, Washington, DC 20530:

Appearance Form
Motion for Leave to Proceed in Forma Pauperis
Affidavit in Support of Motion for Leavel to Proceed in Forma Pauperis
Brief in Opposition to Petition for a Writ of Certiorari

James A. Douglas
JAMES A. DOUGLAS

SUBSCRIBED AND SWORN this 21 day of April, 1986.

KIM WATTS NOTARY PUBLIC 10-29-88 STATE OF WASHINGTON

Kim Watts
NOTARY PUBLIC in and for the State of Washington, residing at Seattle.